

**Fact Sheet**  
**Department of Environmental Quality**  
**June 15, 2005 Declaratory Ruling**

**Why did the Department of Environmental Quality (DEQ) issue the Declaratory Ruling?** On January 21, 2005, the DEQ received a Request for a Declaratory Ruling (Request) from the Sierra Club, Mackinac Chapter. The Sierra Club challenged three aspects of the DEQ, Water Bureau's (WB) National Pollutant Discharge Elimination System (NPDES) General Permit (MIG010000) for new large concentrated animal feeding operations (CAFO). Sierra Club asserted that the General Permit: (1) created an impermissible self-regulatory scheme; (2) violated the federal Clean Water Act (CWA) public participation requirements; and (3) violated certain CWA water quality requirements.

**What is a Declaratory Ruling and what process did DEQ follow in issuing the Ruling?** Under Michigan law, a declaratory ruling is a "quasi-judicial proceeding" in which an administrative agency issues a written opinion much like a judge does in a court case. The ruling is based on the review of legal briefs filed by the requestor and other affected parties. By law, it is **not** a stakeholder involvement process like rulemaking. In this matter, DEQ received legal briefs from the Sierra Club and from the Michigan Farm Bureau. In reaching its decision, DEQ considered both the Sierra Club and Farm Bureau briefs and, after careful deliberation, issued the Declaratory Ruling.

**Did Sierra Club win?** No. DEQ rejected all of Sierra Club's legal challenges.

**Then what does the Declaratory Ruling do?** For the past six years, the Sierra Club has asserted on numerous occasions, that the DEQ has failed to comply with the public disclosure and participation requirements of the Clean Water Act with regard to the regulation of CAFOs. Sierra Club's legal challenges to the General Permit, therefore, pre-date the recent federal *Waterkeeper Alliance v American Farm Bureau* case, but raise similar legal concerns. *Waterkeeper* specifically requires, among other things, that Nutrient Management Plans (NMP) be developed and reviewed by agency personnel before permit issuance occurs, and that the public have sufficient opportunity to comment on the NMP during the CAFO permit process. After reviewing *Waterkeeper* and the briefs received from the Sierra Club and Farm Bureau, the DEQ issued the Declaratory Ruling, which:

1. Clarifies the difference between an NMP and a Comprehensive Nutrient Management Plan (CNMP), and then affirms that the NMP requirements were specifically included in the General Permit after review by DEQ staff, and subject to public comment when the General Permit was first drafted. Because the NMP requirements are scattered throughout the General Permit, the DEQ has agreed to redraft the General Permit to consolidate all of the NMP requirements under one section. The redrafted General Permit will be subject to public notice and comment.
2. Requires identification of all proposed land application areas and adjacent water bodies at the time a permittee submits a notice of intent for coverage, and then insures the public has an opportunity to provide comment on the notice of intent and any proposed certificate of coverage by making them available on the DEQ Web site for 14 days, and then removing them from the site. The public may submit comments or ask for a public hearing through a direct electronic mail link on the Web page.
3. Requires a copy of the CNMP to be submitted to the appropriate DEQ, WB district office and made available to the public upon request.
4. Reaffirms that the water quality requirements of the CWA are met.

**Didn't the *Waterkeeper* court also hold that EPA lacked authority under the CWA to require a CAFO to apply for an NPDES permit based on the potential to discharge?** Yes. In its review of the CWA, the court concluded that EPA could only require a CAFO to apply for an NPDES permit where an actual discharge of pollutants occurred. This issue was not directly before the DEQ as part of the Declaratory Ruling. Even if it had been, the limitation would not apply in that the DEQ has broader authority to regulate CAFOs under state law than EPA does under the CWA. DEQ typically requires permits for direct and indirect discharges to surface and groundwaters, as well as for the storage of substances that may affect the quality of waters of the state.

**By placing the certificates of coverage and notices of intent on the Web page, is DEQ treating farmers differently from other permittees?** No. The certificates of coverage and notices of intent submitted by all permittees seeking coverage under a general permit will be posted on the Web page for public review and comment. This includes general permits covering industrial and municipal storm water, groundwater cleanups, municipal lagoons, noncontact cooling water, and secondary wastewater treatment plants.

**Is the CNMP that must be submitted to the DEQ the same as the CNMP developed for the Michigan Agriculture Environmental Assurance Program (MAEAP)?** No. An NPDES CNMP describes the actions a farmer will take to comply with the NMP portions of the General Permit. Some of the items included in a CNMP developed for the MAEAP are **not** required for a CNMP developed to comply with the NMP requirements of the General Permit. The MAEAP CNMP review checklist contains 122 items. At least 38 of these items are not NPDES CNMP requirements. Examples include: Input to animals (feed management); employee training; method of transfer of wastes; and emergency action plans. Any item that is not an NPDES CNMP requirement does not need to be included as part of the CNMP submitted to the DEQ. The DEQ will prepare a check list identifying items that must be part of the NPDES CNMP.

**What if the CNMP submitted to the DEQ includes proprietary information?** If such information is provided, the Freedom of Information Act (FOIA) requires disclosure of the information *unless* disclosure is exempt. The FOIA includes an exception for business confidential, trade secret information. As in other permit programs administered by the DEQ, a person may submit a request for confidentiality, and the information may be kept confidential if the request is consistent with the law.

**What CAFOs are required to obtain an NPDES permit - and what kind of permit?**

1. All existing CAFOs have until September 1, 2005, to either apply for coverage under the **existing** NPDES general permit for CAFOs, or enroll in the MAEAP option. The MAEAP option is not available after September 1, 2005. An existing CAFO is one that was built and in production prior to February 27, 2004.
2. If an existing CAFO elects to enroll in the MAEAP option, an applicant must remember that, **unless extended by EPA and agreed to by DEQ**, the MAEAP option expires in December 2007. If not extended, the MAEAP option will expire and CAFOs enrolled in the MAEAP option will be required to obtain coverage under an NPDES permit.
3. After September 1, 2005, existing and new CAFOs must seek coverage under the **new** NPDES CAFO General Permit, unless the CAFO is a new large CAFO covered by the Final Determination issued on February 27, 2004 and must obtain an individual NPDES permit. A new CAFO is one built and in production after February 27, 2004.

All NPDES permits – both general permits and individual permits - continue in effect until their expiration date. An NPDES permit is typically issued for a 5-year term and then reissued.